No. 02-1863

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GREENFIELD MILLS, INC., JUDI METLOCK, GENE LEWIS, et al.,

Plaintiffs-Appellants,

v.

LARRY MACKLIN, as Director of the Indiana Department of Natural Resources, GARY ARMSTRONG, NEIL LEDET, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division, No. 00 C 219
William C. Lee, Chief Judge

BRIEF OF UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES ARMY CORPS OF ENGINEERS AS AMICI CURIAE

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INTRODUCTION

In an Order dated December 10, 2002 ("December 10 Order"), the Court invited the United States Environmental Protection Agency and the United States Army Corps of Engineers (collectively "the United States") to file a brief presenting their view on several questions of statutory interpretation with respect to the Clean Water Act, 33 U.S.C. §§ 1251 et seq., that the parties have raised in this case. Amicus curiae the United States hereby submits the following brief in response to the Court's invitation in the December 10 Order.

FACTUAL BACKGROUND AND PROCEDURAL STATUS[1]

Plaintiffs-appellants Greenfield Mills, Inc., and twelve individual plaintiffs (collectively "Appellants") own property abutting the Fawn River in northeastern Indiana. Greenfield Mills, Inc. v. O'Bannon, 189 F.Supp.2d 893, 897 (N.D. Ind. 2002). Defendants-appellees are four officials of the Indiana Department of Natural Resources ("IDNR"). Id. IDNR owns and operates a fish hatchery on the Fawn River upstream from Appellants' property. Id. The River runs through the hatchery property from east to west behind the main administration building, and is dammed, forming a 1.8 acre supply pond. Id. at 897-98. The water level of this pond is regulated by two structures – a flow control structure with six gates at one end of the dam and an emergency spillway at the other. Id. at 898. The gates of the flow control structure are made of horizontal oak boards fitted together, and the top gate must be raised in order to raise the gates below. Id..

In the latter half of 1996, one of the defendant IDNR employees observed that the flow control structure was deteriorating. Id. Over the course of the next year, he and two other defendant-employees sought and obtained funding for proceeding with repairs of the structure.

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1. The following discussion of the facts is drawn from the district court's opinion.

Id. In spring 1998, the employees also noticed problems with the river intake plumbing in the supply pond that drew water into the hatchery. Id. They decided to draw down the supply pond so that they could repair the river intake plumbing and also to serve as a "test draw-down" for the proposed flow control structure repairs. Id. at 898-99.

On May 18, 1998, the employees opened the flow control structure gates and drew down the supply pond until there was only a channel behind the dam. Id. at 899. This process sluiced sediment from the pond bottom downstream. Id. at 899-900. On the same day, one of the Appellants complained to the hatchery and demanded that the employees close the gates. Id. at 899. The employees at first declined to do so, citing the need to complete repairs, but later decided to close the gates, and the supply pond was refilled by the end of the same day. Id. at 899-90. IDNR did not repair the flow control structure that day, nor is it clear from the district court opinion whether IDNR had undertaken such repairs by March 2002.

The parties disagree on the amount of sediment discharged by IDNR during the course of the draw-down and on its effect on the river downstream. Id. at 900-01. Appellants assert that over 100,000 cubic yards of sediment was discharged, causing a massive fish kill downstream, while IDNR claims that the volume discharged was de minimis and did not cause massive destruction to downstream flora and fauna. Id.

In 2000, Appellants brought an action alleging that IDNR violated the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 et seq., and various constitutional rights by opening the flow control structure and causing accumulated sediment to be deposited in the River. Greenfield Mills, 189 F.Supp.2d. at 896. Appellants claimed that IDNR violated the CWA by failing to obtain either a permit for the discharge of pollutants under section 402 of the Act, 33 U.S.C. § 1342, or a permit for the discharge of dredged and fill material under section 404 of the Act, 33 U.S.C. § 1344. Id. at 902. IDNR moved for summary judgment, and Appellants cross-

moved for partial summary judgment. Id. at 896.

On March 11, 2002, the district court denied Appellants' cross-motion and granted summary judgment to IDNR on Appellants' CWA claims and 42 U.S.C. § 1983 due process and takings claims. Id. at 917. Appellants voluntarily dismissed their remaining claims. Id. With regard to the CWA claims, the lower court held that although the term "discharge of dredged materials" in section 404 encompassed dredging by means of hydraulics, which IDNR admitted occurred when it opened the gates, id. at 906, IDNR's discharge was exempt from regulation pursuant to 33 U.S.C. § 1344(f)(1)(B), which establishes an exemption for the maintenance of dams, dikes, and other such structures. Id. at 909. In particular, the district court determined that Appellants did "not seriously question [IDNR's] claim that they were conducting maintenance on the dam," and that in any event, Appellants' assertions that IDNR was merely pretending to engage in dam maintenance were unfounded. Id. at 906-07. It also rejected Appellants' claim that the alleged maintenance fell outside the scope of the exemption because it had changed the "original fill design" of the structures in question by filling in downstream waters. Id. The court also concluded "as a matter of law" that there was no recapture of IDNR's dredging activity because "there is simply no evidence that the maintenance done by [IDNR] had any purpose other than maintenance." Id. at 909. The court accordingly held that IDNR did not need a section 404 permit. Id.

The district court further concluded that no CWA section 402 permit was required, based on its view that no discharge of a pollutant had occurred because IDNR's purpose in opening the gates was to engage in a maintenance activity, not to excavate and move the impounded sediment downstream. Id. at 912. The court reached this conclusion notwithstanding its statement prefacing its discussion of section 402 that "[i]t is critical to note that civil liability under the Clean Water Act is strict and neither mere negligence or [sic] lack of knowledge will

preclude liability," id. at 909 n.16, or its statement in the context of its CWA section 404 analysis that "the unintentional nature of the discharge downstream is a non-factor in the analysis," id. at 905, which it supported with reference to several cases involving CWA section 402. The court entered judgment in favor of IDNR on all claims on March 12, 2002. Shortly thereafter, Appellants filed this appeal.

The day after hearing oral argument, this Court issued an order noting that the case "as presented by the parties to this court, raises several questions of statutory interpretation with respect to the Clean Water Act," and inviting EPA and the Corps of Engineers "to file a brief presenting their view on these issues of statutory interpretation." December 10 Order at 1-2. Because the questions raised concern interpretation of core provisions in the Clean Water Act, the United States has a substantial interest in the outcome of this case.

ARGUMENT

I. IDNR's Activities Resulted In The Discharge Of A Pollutant In The Form of Dredged Material.

Clean Water Act section 301 prohibits "the discharge of any pollutant" except in compliance with a permit or as otherwise authorized under the Act. 33 U.S.C. § 1311(a). The CWA further defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), and creates two permitting regimes for regulating the discharge of pollutants.[2] The discharge of pollutants other than dredged or fill material are generally regulated under section 402, which creates the EPA-administered National Pollutant Discharge Elimination System permitting program. See 33 U.S.C. § 1342. Discharges of dredged or fill material are generally regulated under section 404,

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2. The parties do not dispute that the Fawn River is a "navigable water" or that the flow control structure served as a "point source." See Froebel v. Meyer, 217 F.3d 928, 937 (7th Cir. 2000) (dams may constitute point sources).

which creates the Corps-administered dredge-and-fill permitting program. 33 U.S.C. § 1344.

The discharges in this case fall within the purview of the section 404 program. IDNR admitted that the events at issue here occurred through hydraulic dredging, 189 F.Supp.2d at 906, and does not dispute on appeal that there was a discharge of dredged material,[3] which is one example of a discharge of a pollutant under the Act that requires authorization. See United States v. Huebner, 752 F.2d 1235, 1239 (7th Cir. 1985). The sediment at issue here had settled out of the River onto the bottom of the supply pond, but was added back into the River when IDNR opened the flow control structure, scouring the supply pond bottom and flushing the sediment to a new location downstream. Indeed, the IDNR employees who opened the structures knew that some sediment would be drawn into the Fawn River. Id. at 916, n. 23. The fact that the Act defines the term "pollutant" to include "dredged spoil," 33 U.S.C. § 1362(6), and specifically regulates the discharge of dredged materials, 33 U.S.C. § 1344(a), which typically involves the excavation and deposition of the materials within the same water body, see, e.g., Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923-924 & n.43 (5th Cir. 1983), shows that Congress understood such additions to fall within the Act's coverage. Moreover, the courts of appeals have consistently recognized that materials that have been scooped up and then redeposited in the same waterbody can result in a discharge of a pollutant. See Borden Ranch Partnership v. U.S. Army Corps of Engineers, 261 F.3d 810, 814-15 (9th Cir. 2001), aff'd by an equally divided court, 123 S.Ct. 599 (2002); United States v. Deaton, 209 F.3d 331, 335-36 (4th Cir. 2000); Rybachek v. EPA, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel excavated from a streambed for placer mining and then returned there); United States

3. "The term *dredged material* means material that is excavated or dredged from waters of the United States," 33 C.F.R. § 323.2, 40 C.F.R. § 232.2, and encompasses the sediments at issue here.

v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1503-1506 (11th Cir. 1985) (uprooted and redeposited sea bottom material), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); Avoyelles, 715 F.2d at 923-925 (redeposit of tree roots and vegetation dug up during land clearing). Accordingly, IDNR's release of sediment constitutes an addition of a pollutant in the form of a discharge of dredged material.[4]

Because IDNR's activities are properly regulated under CWA section 404, it is not necessary to reach IDNR's arguments that it did not need to obtain a permit under CWA section 402.[5] However, if the Court does reach IDNR's arguments, we note that it is well-established that civil liability under the CWA is strict and neither mere negligence nor lack of knowledge precludes liability. Kelly v. EPA, 203 F.3d 519, 522 (7th Cir. 2000) (citing cases). See also 189 F. Supp.2d at 905 (citing cases in support of proposition that a discharge need not be an intentional act). Accordingly, IDNR's claim that its purpose was not to move and excavate the sediment that washed downstream but rather to engage in maintenance activity is irrelevant to the issue of whether a discharge of a pollutant occurred.[6]

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4. As a practical matter, "a requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute." Avoyelles, 715 F.2d at 924 n.43.

5. Section 402(a), 33 U.S.C. § 1342(a), states that, "[e]xcept as provided in sections 1328 and 1344, the Administrator may issue permits for the discharge of any pollutant . . . ."

6. National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), and National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988), concern normal dam operations that resulted in changes in water quality -- for example, in Gorsuch, low dissolved oxygen and dissolved minerals and nutrients that occur in reservoirs behind large dams and, in Consumers Power Co., fish that are chopped up in a dam's turbines. Unlike low dissolved oxygen and the chopped-up fish that started out and remained in the water column, the sediment at issue here had settled out of navigable waters, and IDNR's opening of the flow structure control gates dredged those materials from their resting place, adding them back into downstream waters. Gorsuch discusses the role that dams play in trapping sediment, but did not consider dredging or sluicing of trapped sediment as part of its analysis of whether dams add pollutants, primarily because such practices were impractical or rare for the large dams and reservoirs at issue in that case. 693 F.2d at 163-64.

II. The Legal Applicability Of The Section 404(f)(1) Exemption For Dam Maintenance To IDNR's Discharges

CWA Section 404(f)(1) provides a series of exemptions from its permit requirement, including an exemption for "the discharge of dredged or fill material . . . for the purpose of maintenance . . . of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments, or approaches and transportation structures." 33 U.S.C. § 1344(f)(1)(B). Section 404(f)(2) limits the section 404(f)(1) exemptions, providing that:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2). See Huebner, 752 F.2d at 1240.

The parties dispute whether IDNR's activities qualify as dam maintenance for purposes of the section 404(f)(1)(B) exemption and, if so, whether it is nevertheless regulated pursuant to section 404(f)(2). The district court held that Appellants had failed to set forth any competent factual basis disputing IDNR's version of what happened, and therefore accepted that version. 189 F.Supp.2d at 898, 906 n.13. On appeal, Appellants argue that this was error because there is a genuine issue of material fact. See, e.g., Appellants' Brief on Appeal at 26-27. Rather than address this fact-based argument, we address the statutory interpretation issues that the parties have raised concerning the dam maintenance exemption and the legal consequences of the district court's view of the facts.

Under the district court's understanding of the facts, IDNR discharged water and the accompanying sediment through the flow control structure in order to draw down the pond so that it could inspect the flow control gates and perform repairs on an intake valve. See 189

F.Supp.2d at 906 & n.13. If the draw-down and resulting discharge of sediment was necessary to perform those maintenance functions, those inspection and repair activities qualify as maintenance of currently serviceable dam structures. See 33 C.F.R. § 323.4(a)(2) (exempting any discharge that may result from dam maintenance).[7] They would also be exempt from regulation under section 402 of the CWA by virtue of 33 U.S.C. § 1344(f)(1) (activities exempt under 33 U.S.C. § 1344(f)(1) are "not prohibited by or otherwise subject to regulation under this section [1344] or section 1311(a) or 1342 of this title . . . .")

Section 404(f)(2) requires a person to obtain a section 404 permit if the person engages in a discharge of dredged or fill material that would be otherwise exempt under section 404(f)(1), only if that activity (a) has "as its purpose bringing an area of the navigable waters into a use to which it was not previously subject," and (b) has the consequence of impairing the flow or circulation of navigable waters or reducing the reach of such waters. 33 U.S.C. § 1344(f)(2). Accordingly, if the district court's understanding of the facts is accepted, this provision does not apply to IDNR's activities even if those activities had some incidental downstream effects because IDNR's "sole objective in raising the flow control gates was to inspect the dam and

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perform maintenance," not bring an area of the navigable waters into a new use. See 189 F.Supp.2d at 908.

February 24, 2003 Respectfully submitted,

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7. The regulations state that "[m]aintenance does not include any modification that changes the character, scope, or size of the original fill design." 33 C.F.R. § 323.4(a)(2); 40 C.F.R. § 232.3(c)(2). Appellants argue that IDNR's activity does not qualify as maintenance because the sediment deposited downstream changed the "original fill design" of the River, but this phrase refers to the manmade structures that are the subject of the exemption (e.g. dikes, dams, levees) rather than a natural watercourse such as the Fawn River.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(a), I certify that the attached Brief of United States Environmental Protection Agency As Amicus Curiae does not exceed fifteen pages.

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Sylvia Quast

CERTIFICATE OF SERVICE

I certify that on February 24, 2003, copies of the BRIEF OF UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES ARMY CORPS OF ENGINEERS AS AMICI CURIAE both in paper and on floppy disk (PDF format) were sent via overnight delivery to the Clerk for the Seventh Circuit Court of Appeals and via fax and U.S. Mail to counsel of record as follows:

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